IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In Re Detention of Charles DeCuir	)	No. 59808-2-I
	)	
STATE OF WASHINGTON,	)	
	)	UNPUBLISHED OPINION
Respondent	)	
v.	)	
	)	
CHARLES DECUIR,	)	
	)	FILED: April 12, 2010
Appellant.	)	
	)	

SCHINDLER, J. — Charles DeCuir appeals his civil commitment as a sexually violent predator (SVP) under chapter 71.09 RCW. He argues the trial court erred by failing to instruct the jury that the basis for expert opinion testimony should not be considered as substantive evidence. He also argues the court erred by denying his motion to suppress evidence of the pre-filing mental evaluation conducted by a psychologist for the Department of Corrections (DOC) under RCW 71.09.025(1)(a)(v). We reject DeCuir's arguments, and affirm.

FACTS

In 2000, DeCuir was convicted as a juvenile of child molestation in the first

degree for an offense he committed against his younger sister when he was fourteen. In 2003, after his release from juvenile detention, but while subject to electronic monitoring, DeCuir cut off his ankle bracelet and left home. DeCuir was arrested the next day after he stalked and attempted to kidnap a woman at knifepoint in a public park. DeCuir later admitted he was sexually aroused at the time by thoughts of raping and beating the woman. DeCuir subsequently entered a guilty plea to attempted kidnapping in the second degree.

In May 2004, as DeCuir neared the end of his term of imprisonment, the DOC End of Sentence Review Committee (ESRC) referred DeCuir to the State Attorney General's Office (AG) for consideration for involuntary civil commitment as a sexually violent predator under chapter 71.09 RCW.

While DeCuir was still incarcerated for the kidnapping offense, forensic psychologist Dr. J. Robert Wheeler completed a psychological evaluation of DeCuir for the ESRC in October 2004. Wheeler conducted more than nine hours of interviews with DeCuir, interviewed treatment providers and other witnesses, and reviewed more than 2000 pages of documentary materials. Based in part on Dr. Wheeler's evaluation, in November 2004 the Attorney General filed a petition for DeCuir's commitment as a sexually violent predator under chapter 71.09, RCW.

Before trial, DeCuir filed a motion to suppress Dr. Wheeler's evaluation and

exclude his testimony. DeCuir argued that conducting an evaluation before filing an SVP petition was improper because, as a matter of statutory interpretation and due process, any potential candidate for SVP referral should be afforded counsel at public expense before a petition for commitment is filed. The trial court denied the motion.

Trial took place in 2007. Before Dr. Wheeler testified, the court asked whether the parties wanted oral limiting instructions read to the jury for the testimony that was only admissible as a basis for his expert opinion, or instead, to address the issue at the end of the trial. Neither party requested a limiting instruction as to Dr. Wheeler or DeCuir's expert witness, Dr. Novick-Brown.

Dr. Wheeler testified based on his initial evaluation of DeCuir and review of over 1200 pages of additional materials he received before trial. In Dr. Wheeler's opinion, DeCuir suffered from sexual sadism and a personality disorder that rendered him likely to reoffend. DeCuir presented the testimony of forensic psychologist Dr. Natalie Novick Brown, who disagreed with Dr. Wheeler's diagnosis and opinion.

At the conclusion of the trial, defense counsel proposed a jury instruction limiting consideration of the materials relied on by the experts for their opinions. The proposed instruction provided, in pertinent part:

> When Dr. Novick-Brown and Dr. Wheeler testified, information was admitted as part of the basis for their opinions, but may not be considered for other purposes. You must not consider this testimony as proof that the information relied upon by the witnesses is true. You may use this testimony only for the purpose of deciding

what credibility or weight to give the witnesses' opinion.

Over counsel's objection, the court declined to give the proposed instruction, noting that the comment to the pattern instruction it was based on specifically stated the instruction should only be used when the court had given an oral limiting instruction during the testimony, and counsel had requested no such instruction.

The jury found that DeCuir was a sexually violent predator. DeCuir appeals.

Jury Instruction

DeCuir first contends the trial court erred by failing to give his requested jury instruction. The State responds that the trial court correctly rejected the instruction as it would have been legal error to give it. We agree with the State.

We review de novo alleged errors of law in jury instructions. State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). The trial court has no duty to give an erroneous instruction, to rewrite an incorrect instruction, or to give an instruction not requested. State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979); State v. Barber, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984).

Under ER 703, an expert may testify regarding the facts or data providing the basis for the expert's opinion even if the facts or data may not be independently admissible as long as the information is of a type reasonably relied upon by experts in the field. However, such evidence is admitted only for the purpose of assisting the jury

in understanding the expert's testimony. In re Det. of Marshall, 122 Wn. App. 132, 144-45, 90 P.3d 1081 (2004). When evidence is admitted for a limited purpose, the court must give a proper limiting instruction upon the request of the party against whom the evidence is admitted. State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001).

DeCuir's proposed instruction was based on 6A WASHINGTON PATTERN JURY INSTRUCTIONS: Civil 365.04 (5th ed. 2005) (WPI).[1] However, as made clear by the note on use for WPI 365.04, whether such an instruction is proper depends upon whether there was a prior oral instruction identifying the evidence admitted for a limited purpose when that evidence was introduced.[2] Here, there was no such prior identification of evidence admitted only for a limited purpose. The trial court did not err in failing to give DeCuir's instruction.

DeCuir nonetheless relies on this court's observation in State v. Ramirez, 62 Wn.App. 301, 305, 814 P.2d 227 (1991) (citations and notes omitted), that "[a]lthough it

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[1] Although DeCuir cited WPI 365.03 as authority for his proposed instruction, the text of the instruction shows it was actually based on a modification of the second paragraph of WPI 365.04, which provides:

> When _____ testified, I informed you that some information was admitted as part of the basis for [his] [her] opinion, but may not be considered for other purposes. You must not consider this testimony as proof that the information relied upon by the witness is true. You may use this testimony only for the purpose of deciding what credibility or weight to give the witness's opinion.

WPI 365.03, which DeCuir cited, is the oral instruction designed to be given at the time expert testimony relying on hearsay or other otherwise inadmissible evidence is introduced.

[2] The note on use for WPI 365.04 provides, in pertinent part, "Use the second paragraph only if a limiting instruction was given during the trial."

is usually preferable to give a limiting instruction contemporaneously with the evidence at issue, it is within a trial court's discretion to choose instead to give a limiting instruction at the close of all of the evidence." DeCuir contends that his instruction was necessary to prevent the jury from considering evidence submitted as the basis of Dr. Wheeler's opinion as substantive evidence.

But the instruction proposed by DeCuir in this case would have excluded from the jury's consideration as substantive evidence everything Dr. Wheeler relied upon in reaching his opinions and conclusions. As became apparent during discussion of motions in limine pretrial, much of the evidence on which Dr. Wheeler relied was actually admissible for substantive purposes as well as for the limited purposes of ER 703. For example, it was undisputed that DeCuir's statements to Dr. Wheeler were not hearsay and were admissible as substantive evidence under ER 801(d)(2).[3] DeCuir's proposed instruction would have improperly limited the jury's consideration of admissible evidence. Because DeCuir's proposed instruction would have misstated the law, the trial court did not err in refusing to give the instruction. Robinson, 92 Wn.2d at 363.[4]

[3] In addition, witnesses at trial testified to many of the other statements relied on by Dr. Wheeler so those statements were also properly admitted as substantive evidence. Indeed, when the court asked defense counsel to identify any specific evidence Dr. Wheeler had relied upon that was not substantively admissible under ER 801(d)(2) or other rules or exceptions, counsel was unable to do so.

[4] Because we conclude that the trial court correctly refused to give DeCuir's proposed instruction, we do not address the State's alternative argument that any such instructional error was harmless.

Dr. Wheeler's Evaluation and Testimony

DeCuir next argues that Dr. Wheeler's evaluation and testimony should have been suppressed as obtained in violation of his right to counsel. Our Supreme Court recently rejected a similar argument in In re Det. of Strand, 167 Wn.2d 180, 217 P.3d 1159 (2009).[5] The Strand court considered three arguments raised by an SVP respondent, the first two of which are relevant here: "(1) that [an evaluator's] prefiling evaluation was in violation of the SVP statute and therefore violated his due process rights [and] (2) that he was not provided with counsel during [the] prefiling evaluation, . . . " Strand, 167 Wn. 2d at 187.[6] The Supreme Court rejected each claim.

The court in Strand held that a prefiling psychological examination was authorized by RCW 71.09.025(1)(b). Strand, 167 Wn.2d at 187-88. RCW 71.09.025(1)(b) provides in pertinent part:

> The agency [with jurisdiction] shall provide the prosecutor with all relevant information including but not limited to the following information:
> ...
> (iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;
> ...

[5] This case was stayed pending the Supreme Court's decision in Strand and, at the direction of the court, the parties provided supplemental briefing on the effect of Strand on DeCuir's appeal. The State filed a motion to strike DeCuir's supplemental brief as exceeding the scope of this court's directive. The motion to strike is denied.

[6] The third argument, related to the failure of the trial court in Strand to provide a voluntariness hearing, is not relevant here. DeCuir, who signed a written advisement that he did not have to speak to Dr. Wheeler and that his statements could be used against him in an SVP proceeding, has not challenged the voluntariness of his statements to Dr. Wheeler.

> (v) A current mental health evaluation or mental health records review.

The court also rejected Mr. Strand's argument that he was entitled to the presence of counsel at the prefiling examination, reasoning that the SVP statute specifically provided a right to counsel only after the petition was filed. Strand, 167 Wn.2d at 190.

DeCuir attempts to distinguish Strand. DeCuir argues that unlike the preliminary examination in Strand, Dr. Wheeler's evaluation constituted a "complete RCW 71.09.040(4) psychological evaluation without counsel." DeCuir contends that Dr. Wheeler's examination was so thorough that it should be considered a full RCW 71.09.040(4) examination rather than a preliminary RCW 71.09.025(1)(b)(v) "current mental health examination," because it left nothing to be done during a second examination, whereas in Strand the prefiling examination was followed by a second, presumably more thorough examination. In addition, according to DeCuir, contrary to chapter 71.09 RCW, the ESRC erred in submitting Dr. Wheeler's evaluation after its referral of DeCuir's case to the AG, rather than at the same time as its referral. Because of this timing, DeCuir argues that the ESRC lost any authority to conduct such an examination. DeCuir's attempts to distinguish Strand are not persuasive.

That Dr. Wheeler's initial examination was comprehensive does not disqualify it as a "current mental health evaluation" under RCW 71.09.025 or Strand. Neither "current mental health evaluation," nor "evaluation as to whether the person is a

sexually violent predator," as used in RCW 71.09.040(4), is defined in the statute. See RCW 71.09.020. DeCuir offers no objective test for determining when a prefiling evaluation under RCW 71.09.025 would become so thorough that it would constitute an evaluation under RCW 71.090.040(4), and in this setting, where each evaluation process will necessarily be unique to the individual, there no basis for concluding that the legislature has implicitly drawn such a line.

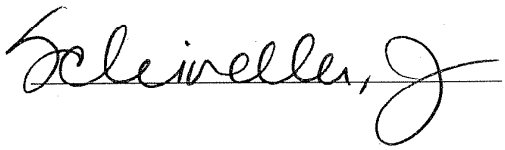
DeCuir relies on the fact that no second evaluation was performed in this case to argue that the first evaluation was improper. But Dr. Wheeler testified that after his initial 2004 evaluation, he reviewed over 1200 pages of new material available in 2007, and would have preferred to interview DeCuir again. He understood, however, that DeCuir had declined to participate in further interviews based on advice of counsel. As the trial court correctly observed, adopting DeCuir's analytical approach would only provide an incentive for the DOC to conduct a less than thorough initial evaluation and encourage the State to perform a second evaluation in every case, whether needed or not. Nothing in the statute suggests this was the legislature's intent.

We also reject DeCuir's contention that the ESRC lost authority to conduct an RCW 71.09.025 evaluation because it had already referred DeCuir to the AG. While RCW 71.09.025(1)(a) requires the initial referral three months before the subject's anticipated release, RCW 71.09.025(1)(b), which requires the referring agency to

provide the prosecutor with "all relevant information," contains no timing requirement and does not mandate that such information must be provided contemporaneously with the referral. Indeed, it would be contrary to the overall purpose of the statute to prohibit the ESRC from providing any relevant information about an SVP referral, because of the clear statutory intent that the AG's decision and the court's probable cause determination should be based on the best information available. See Strand, 167 Wn.2d at 188 (relying on a "comprehensive reading of chapter 71.09 RCW" in determining the plain meaning of "current" in RCW 71.09.025(1)(b)(v)). We conclude that ESRC's supplementation of its referral with Dr. Wheeler's evaluation during the period the Strand court described as the "the investigatory period prior to a probable cause filing," was proper. See Strand, 167 Wn.2d at 190.

We conclude the trial court did not err by declining to suppress Dr. Wheeler's evaluation and testimony.

We affirm.



WE CONCUR: